ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.606(b),	)	MM Docket No. 93-191
Table of Allotments,	)	RM-8088
TV Broadcast Stations,	)	
(Pueblo, Colorado)	)	

To: The Commission

JOINT APPLICATION FOR REVIEW

Wayne Coy, Jr.

Counsel for The University of
Southern Colorado

COHN & MARKS
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860

Kevin F. Reed
Suzanne M. Perry
Elizabeth A. McGeary

Counsel for Sangre de Cristo
Communications, Inc.

DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

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SUMMARY OF ARGUMENT

The Staff Decision denying the Channel Swap lacks any legal basis and ignores the Channel Swap's substantial public interest benefits.

The Cheyenne Mountain Permit must be included in the Channel Swap because, contrary to the Staff's conclusions, Commission rules mandate that construction permits for new facilities or modified facilities -- whether they are built or unbuilt -- be included in channel exchanges. Longstanding Commission precedent dictates the same result.

So does logic: had the University implemented the Cheyenne Mountain Permit, there would have been no basis for disapproving the Channel Swap. The happenstance that SCC rather than the University will implement the Cheyenne Mountain Permit (thus, saving the University the associated expense, yet another public interest benefit) cannot as a matter of common sense control the outcome of this proceeding.

The Staff erred in concluding that SCC's commercial status required de novo review of the short-spacing waiver reflected in the Cheyenne Mountain Permit. Because the grant of the Cheyenne Mountain Permit has been decided and is a final order, it is res judicata. Therefore, based on longstanding legal principles, the Staff may not relitigate the waiver's merits. Moreover, Commission precedent prohibits the Staff from predicating grant of a technical rule waiver on an applicant's commercial or noncommercial status. Indeed, the Staff's commercial/noncommercial distinction suggests a preference for noncommercial over commercial programming that bears no relationship whatsoever to Section 73.610's underlying purposes. This distinction cannot be reconciled with the First Amendment's prohibition on content-based regulation.

The Staff compounded its error by reconsidering the waiver's merits in an allotment context. Because channel exchanges do not result in the creation of a new allotment or any

other substantive change to the allotment table, the Commission has recognized that standard allotment policies and rules do not apply. In short, de novo review of the short-spacing waiver should never have occurred.

The Staff's failure to recognize the Channel Swap's substantial public interest benefits was manifest error. The Channel Swap will enable the University to enhance its educational programming and, through an expanded translator network, provide first noncommercial educational service to 82,871 people on Colorado's Western Slope, and expand its coverage of Colorado Springs. The Staff improperly discounted these service gains, and in doing so, not only contradicted its earlier holdings on the likelihood of translator displacement but also flatly ignored factual evidence demonstrating that displacement of the University's translators was a remote possibility. The Staff also disregarded the Commission's longstanding recognition of translators' unique role in providing off-the-air television service to remote communities in Colorado. Finally, the Staff ignored the fact that the citizens of Colorado will derive substantial benefit from the improvement in commercial as well as noncommercial service.

The Staff Decision prejudiced the Channel Swap's outcome and ultimately the public interest by failing to consolidate the Channel Swap with other interrelated proceedings. These Collateral Proceedings are legally and factually inseparable from the Channel Swap and therefore must be considered together. The Staff's decision not to grant the Consolidation Motion has now opened the door for the Commercial Competitors to relitigate the Channel Swap's merits in six separate proceedings, promising needless and certain additional delay in the Channel Swap's implementation and a waste of agency resources.

JOINT APPLICATION FOR REVIEW

Table of Contents

Page

I. Introduction. 1

II. Questions Presented For Review 3

III. The Staff's Failure to Include the Cheyenne Mountain Permit in the Channel Swap Contravenes Statute, Regulation, Case Precedent and Policy. . . . 3

A. The Commission's Channel Exchange Rules and Case Precedent Both Explicitly Authorize the Exchange of Construction Permits. 4

B. The Staff's De Novo Review of Grant of the Cheyenne Mountain Permit Is Contrary to Law and Policy. 6

1. Grant of the Cheyenne Mountain Permit is Res Judicata . . 6

2. De Novo Review of the Short-Spacing Waiver Based on SCC's Commercial Status Violates FCC Precedent and the First Amendment 8

3. The Staff's Application of Allotment Waiver Policies Was Improper 11

C. The Staff Failed to Recognize the Substantial Public Interest Benefits Resulting from the Channel Swap. 13

1. Monetary and Technical Benefits 14

2. Gains in Service 15

3. Benefits to SCC 18

4. Public Support for the Channel Swap 19

IV. The Staff's Refusal To Consolidate the Channel Swap With The Collateral Proceedings Constituted Prejudicial Procedural Error. 20

V. Conclusion 22

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The University of Southern Colorado (the "University"), licensee of noncommercial educational Television Station KTSC(TV), Channel *8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of commercial Television Station KOAA-TV, Channel 5, Pueblo, Colorado, by their respective attorneys, jointly apply for review of the decision[1/] of the Chief of the Allocations Branch of the Mass Media Bureau's Policy and Rules Division (the "Staff") denying their joint petition for an exchange of their television channel assignments (the "Channel Swap").[2/]

I. Introduction.

The issue in this proceeding is whether the public interest permits -- indeed requires -- the FCC to allow the University to exchange its Channel *8 authorization with SCC in return for SCC's channel 5 authorization and a generous financial endowment. The Channel Swap --

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1/ Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Pueblo, Colorado), MM Docket No. 93-191 (July 14, 1995) (the "Staff Decision") (Exhibit A hereto).

2/ See Petition of the University and SCC for Issuance of Notice of Proposed Rulemaking to Exchange Channels (Sep. 8, 1992) ("Joint Petition") (Exhibit B hereto).

the University's VHF license and construction permit in exchange for SCC's VHF license and superior transmitter plant in the same market, plus one million dollars, a television translator station, and continuing engineering and programming support -- will enable the University to survive and prosper notwithstanding substantially diminished funding for educational broadcasting. This proceeding does not involve a noncommercial station which is "trading down" or, in any way ending up with an inferior signal, facilities or reduced coverage. To the contrary, the University will increase KTSC's coverage area and significantly enhance its programming.

The Staff ignored the obvious benefits to the University and the Colorado viewing public. Instead, it chose inexplicably to focus on the distortions and conjectures of Pikes Peak Broadcasting Company ("Pikes Peak") and KKTV, Inc. ("KKTV"), KOAA-TV's competitors who apparently will stop at nothing to prevent SCC from serving the entire Colorado Springs/Pueblo region from the market's antenna farm atop Cheyenne Mountain.[3/]

The Staff Decision defies logic and patently ignores the public interest. The Staff's failure to approve the Channel Swap, including the University's construction permit to relocate its facilities to Cheyenne Mountain (the "Cheyenne Mountain Permit"), contravened federal statute, longstanding Commission rules, case precedent and policy, not to mention basic First

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3/ KKTV is the licensee of Television Station KKTV, Colorado Springs, Colorado. Pikes Peak is the licensee of Television Stations KRDO-TV, Colorado Springs, and KJCT-TV, Grand Junction, Colorado. (KKTV and Pikes Peak are collectively referred to herein as the "Commercial Competitors"). The Commercial Competitors both broadcast from Cheyenne Mountain but have strenuously opposed SCC's attempts to improve its service to Colorado Springs, having opposed SCC's application to operate a satellite television station on Channel 32 at Colorado Springs, see tvUSA/Pueblo, Ltd., 4 FCC Rcd 598, 600 (1989), rev. denied, 68 RR 2d 1086 (1990), in addition to their opposition in this and interrelated proceedings.

Amendment principles. See 47 C.F.R. § 1.115(b)(2)(i) (1995). Furthermore, the Staff's refusal to consolidate the Channel Swap with other collateral proceedings[4/] directly related to the Channel Swap constituted prejudicial procedural error. See 47 C.F.R. § 1.115(b)(2)(v). The Staff Decision must therefore be reversed and the Commission must approve the Channel Swap as originally proposed by the University and SCC.

II. Questions Presented For Review

1. Did the Staff err in refusing to approve the Channel Swap and to include the Cheyenne Mountain Permit?

2. Did the Staff err in denying the Consolidation Motion?

III. The Staff's Failure to Include the Cheyenne Mountain Permit in the Channel Swap Contravenes Statute, Regulation, Case Precedent and Policy.

The Staff's refusal to include the Cheyenne Mountain Permit in the Channel Swap ignored the specific terms of the Commission's channel exchange rules as well as established precedent, both of which plainly permit exchanges of construction permits as well as licenses. The premise for this refusal -- the Staff's erroneous conclusion that SCC would have to obtain its own short-spacing waiver even though the University's Cheyenne Mountain Permit incorporated such a waiver -- is equally contrary to rules, precedent and policy. The unopposed, final grant of the University's short-spacing waiver is res judicata. FCC precedent does not

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4/ The University's and SCC's Joint Motion to Consolidate Proceedings (the "Consolidation Motion") asked the Commission to consolidate the Channel Swap with interrelated proceedings involving: (a) extension of the Cheyenne Mountain Permit (File No. BPET-930216KE); (b) assignment of the Cheyenne Mountain Permit from the University to SCC (File No. BAPED-930902KE); (c) the University's applications for translators to serve Grand Junction, Cortez-Red Mesa, Durango, and Ignacio, Colorado (File Nos. BPTT-930330CA-CD); and (d) the construction permit and grant of special temporary authority for the operation of Television Translator K15BX, Colorado Springs, Colorado (File Nos. BMPTT-921002JE; BMPTT-911105JE) (collectively, the "Collateral Proceedings").

support the Staff's demand that because SCC broadcasts commercial programming it must obtain a second de novo waiver. Indeed, the First Amendment prohibits such a requirement.

Not only does the Staff Decision defy precedent: it also flatly ignores the substantial public interest benefits that the Channel Swap will create for the University, citizens of Colorado and SCC. The Staff Decision thus disregards both the underlying purpose of channel exchanges and the undisputed and grave funding problems faced by public broadcasters like the University.

A. The Commission's Channel Exchange Rules and Case Precedent Both Explicitly Authorize the Exchange of Construction Permits.

The Staff fails to articulate any legal basis for its conclusion that the Commission's channel exchange rules and policies do not apply to a construction permit to modify licensed facilities. Without citing any supporting regulation, case or policy, the Staff baldly asserts that "[n]othing in Section 1.420(h) or the Commission's policies underlying that rule requires the transfer of a construction permit held by a licensee . . . as part of a channel exchange."[5/] The reason for the lack of support is clear; contrary to the Staff's conclusion, Commission rules and case precedent unequivocally provide that channel exchange policies apply equally to licensees and permittees.

In adopting Section 1.420(h), the Commission specifically stated that it was "unnecessary to limit the availability of this procedure to licensees" and that the channel exchange rule "will apply to permittees."[6/] Section 1.420(h) thus explicitly provides that "licensees (or permittees)"

5/ Staff Decision at ¶ 21.

6/ Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, 59 RR 2d 1455, 1464a (1986) (emphasis added) (the "Channel Exchange Order"), recon. denied, 3 FCC Rcd 2517 (1988).

may petition to amend the television Table of Allotments to exchange noncommercial and commercial channels.[7/] There is no distinction made in either the Commission's Channel Exchange Order or Section 1.420(h) between a construction permit to build new facilities and a construction permit to modify licensed facilities. As the University and SCC demonstrated in their Joint Comments in this proceeding, any such distinction would be meaningless.[8/] Unbuilt facilities are unbuilt facilities whether or not they pertain to a new station or modification of an existing licensed facility.

Precedent confirm this basic premise. The Commission has previously approved two exchanges involving unbuilt construction permits, in both cases, allowing a noncommercial licensee or permittee to exchange its authorization for a commercial permit.[9/] These cases are indistinguishable from the instant case: certainly, the Staff Decision does not distinguish them.

7/ 47 C.F.R. § 1.420(h) (emphasis added).

8/ See Joint Comments of the University and SCC at 4-9 (Sept. 3, 1993) (the "Joint Comments") (Exhibit D hereto).

9/ See Amendment of Section 73.606(b) (Gary, Indiana), MM Docket No. 86-80, 51 Fed. Reg. 30364 (Aug. 26, 1986) ("Gary, Indiana"), recon. dismissed, 1 FCC Rcd 975 (1986); Amendment of Section 73.606(b) (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (1989) ("Clermont, Florida"), recon. denied, 5 FCC Rcd 6566 (1990), aff'd sub nom., Rainbow Broadcasting Co. v. FCC, 949 F.2d 405 (D.C. Cir. 1991). In Gary, Indiana, a commercial station was allowed to relocate its transmitter to the Sears Tower in Chicago, a site used by other Chicago broadcasters and from which the commercial station would be able to serve Gary and increase its competitive position in Chicago. See Notice of Proposed Rulemaking (Gary, Indiana), MM Docket No. 86-80, FCC 86-118 at ¶ 3. Similarly, the commercial permittee in Clermont, Florida requested and was given approval to swap channels with a noncommercial station and to move its transmitter, not to the noncommercial station's licensed site, but rather to the commercial station's site of choice. Such a move was intended to ensure that the commercial station would continue service to its city of license, Clermont, but also would be able to increase service to and enhance its competitive position in the much larger Orlando market. Clermont, Florida, 4 FCC Rcd at 8320.

To the contrary, the Staff expressly concedes that the Commission has previously approved construction permit swaps.[10/]

Logic also confirms this precedent. Had the University implemented its permit,[11/] the Channel Swap presumably would have been approved, as the presence of a construction permit was the principal impediment to grant. Why should the timing of the permit's implementation be decisional? The Staff does not explain why, nor it there any apparent logical reason.

Given Section 1.420(h)'s express mandate and Commission precedent allowing exchanges involving construction permits, the Staff's exclusion of the Cheyenne Mountain Permit from the Channel Swap was plainly erroneous.

B. The Staff's De Novo Review of Grant of the Cheyenne Mountain Permit Is Contrary to Law and Policy.

1. Grant of the Cheyenne Mountain Permit is Res Judicata. The Staff is prohibited from re-evaluating grant of the Cheyenne Mountain Permit because the matter is res judicata (literally, the "matter has been decided").[12/] Res judicata requires (a) that the initial judgment

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10/ Staff Decision at ¶ 22. The Staff's attempt to distinguish Gary, Indiana and Clermont, Florida by pointing to the University's short-spacing waiver fails to demonstrate, or even argue, how a construction permit granted pursuant to a short-spacing waiver under Section 1.420(h) is any different from a construction permit for a fully-spaced site. Both reflect the ultimate conclusion that the public interest was served by their grant.

11/ The University's reasons for delaying implementation of the Cheyenne Mountain Permit have been explained to the Commission and reflect its good faith concern for the use of public funds rather than a lack of commitment to the Cheyenne Mountain Permit. See Joint Comments at 11-14.

12/ The principles of res judicata clearly apply to the actions of an agency acting in a judicial capacity. U.S. v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Gordon County Broadcasting Co. v. FCC, 446 F.2d 1335, 1338 (D.C. Cir. 1971) (holding that FCC licensing proceedings are adjudications subject to the principles of res judicata); RKO General, Inc., 82 FCC 2d 291, 313 (1980) ("it is well-settled, moreover, that FCC licensing proceedings are adjudications subject to the principles of res judicata").

was a final judgment on the merits; (b) that the second proceeding is between the same parties or their privies; and (c) that the identical cause of action is at issue in the second proceeding.[13/] Its purpose is to ensure that issues and claims once decided should be final and that there should be an end to litigation.[14/]

Res judicata's first requirement is obviously satisfied here. The Cheyenne Mountain Permit was granted on February 28, 1991. Public Notice of the grant was published on March 7, 1991. No petitions for reconsideration or applications for review were filed and the grant became a final order on April 16, 1991. Thus, the Cheyenne Mountain Permit is a valid authorization no longer subject to administrative or judicial review.[15/]

Although SCC was not a party to the proceedings involving grant of the Cheyenne Mountain Permit, SCC is in contractual privity with the University, satisfying the second element of res judicata. Two parties are considered to be in "privity" if their relationship is such that "a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit" or if the parties are so identified in interest that they represent precisely the same legal right with respect to the subject matter involved, even though

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13/ 4 Jacob A Stein, Glenn A. Mitchell, Basil J. Mezines & Joan D. Mezines, Administrative Law, § 40.01 (1987).

14/ Id.

15/ Almost a year and one-half after the date on which the Cheyenne Mountain Permit became final (and less than a month after the filing of SCC's and the University's Joint Petition), Pikes Peak filed an untimely Petition for Reconsideration of the Cheyenne Mountain Permit grant based on an erroneous, duplicate and untimely public notice issued under odd circumstances. When the Staff dismissed the Petition as untimely, the Commercial Competitors filed Petitions for Issuance of an Order to Show Cause why the Cheyenne Mountain Permit should not be revoked. Those Petitions remain pending, but, as revocation petitions, inherently concede the Cheyenne Mountain Permit's validity.

only one of them was a party to the initial litigation.[16/] "Privity" also may be established through "identity of cause of action and of interest in the two cases."[17/]

The interests of the University and SCC in the Cheyenne Mountain Permit are exactly the same and represent the same legal right. Both parties have an interest in operating Television Channel 8 on the terms specified in the Cheyenne Mountain Permit. Upon approval of the Channel Swap, SCC will succeed to the University's interest in the Cheyenne Mountain Permit.[18/] Thus, SCC's interest and potential legal right in the Cheyenne Mountain Permit are identical to those of the University. SCC is, in short, in privity with the University. Based on this identity of interests, the third element of res judicata, the same cause of action, is also satisfied. In sum, because grant of the Cheyenne Mountain Permit with its short-spacing waiver is res judicata, the Staff cannot revisit the waiver's merits.

2. De Novo Review of the Short-Spacing Waiver Based on SCC's Commercial Status Violates FCC Precedent and the First Amendment. Not only does the Staff Decision violate established principles of res judicata: its claim that SCC's commercial status requires de novo review of the University's short-spacing waiver violates both Commission precedent and the First Amendment's prohibition of content-based regulation. The Staff Decision holds - without any legal support - that a new short-spacing waiver is required for the Channel Swap because

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16/ Montgomery County Media Network, 4 FCC Rcd 3749, 3750 (1989) (citing Gill & Duffus Servs., Inc. v. A.M. Nural Islam, 675 F.2d 404, 405 (D.C. Cir. 1982)).

17/ Id.

18/ Indeed, the exchange proposed here is functionally the same as an assignment of license for a full service station, where the Commission certainly would not reevaluate the merits of a short-spacing waiver granted to the station's original licensee. See, discussion infra, n.35; Joint Comments at 8, n.16.

a commercial, rather than a noncommercial, licensee would operate pursuant to the waiver.[19/] But as explained below, FCC and judicial precedent uniformly hold that an applicant's commercial or noncommercial status is irrelevant to technical rule waivers like the short-spacing waiver at issue here.

Section 73.610's minimum distance requirements are purely technical in nature and are completely neutral vis-a-vis an applicant's commercial or noncommercial status.[20/] The rule's underlying purpose -- to allow television stations to operate with maximum facilities without causing interference to other stations' operations -- is independent of stations' noncommercial and commercial status.[21/] It is well-established that the Commission does not base waivers of technical rules like Section 73.610 on non-technical grounds. The Commission thus has consistently refused to consider non-technical reasons such as minority ownership, special programming or noncommercial status when considering waivers of its short-spacing rules.[22/]

19/ Staff Decision at ¶ 23 ("Commission case law does not require us to approve a channel exchange that would result in a commercial station moving to a site at which it would be short-spaced.") Not surprisingly, the Staff Decision omits any reference to or citation of the uncited "case law" on which it relies inasmuch as no such case law exists.

20/ See Joint Reply Comments of SCC and the University at 15-17 (Sept. 27, 1993)(the "Joint Reply Comments") (Exhibit E hereto).

21/ Id. at 15. See Sarkes Tarzian, Inc., 6 FCC Rcd 2465, 2466 (1991); Caloosa Television Corp., 3 FCC Rcd 3656, 3657 (1988), recon. denied, 66 RR 2d 1303 (1989).

22/ See ICBC Corp. v. FCC, 716 F.2d 926, 930 (D.C. Cir. 1983) (upholding the validity of FCC policy refusing to consider non-technical reasons in waiving a technical rule); Universal Broadcasting of Indiana, Inc., 59 RR 2d 946, 948 (1986) (waiver of FM minimum spacing requirements denied despite potential for increased availability of minority programming); Walter P. Faber, Jr., 6 FCC Rcd 3601, 3603 (1991), aff'd sub. nom., Faber v. FCC, 962 F.2d 1076 (D.C. Cir. 1992) (table); South Missouri Broadcasting Co., 7 FCC Rcd 2989, 2991 (1992) (rejecting applicant's claim that its long history of daytime AM service to the community warranted waiver of minimum spacing requirements); Bobby

(continued...)

Grant of the University's short-spacing waiver to operate from Cheyenne Mountain was clearly based on the University's technical showing under Section 73.610, not on KTSC's noncommercial status.[23/] The Kreisman Letter does acknowledge that the University is a noncommercial licensee, but that passing reference did not form the basis for grant of the waiver in any respect.[24/] Instead, the waiver grant was based on the content-neutral standards applied in all short-spacing waiver cases.[25/] Because KTSC's noncommercial status was -- and had to be -- irrelevant to grant of the Cheyenne Mountain Permit, the fact that a commercial station may succeed to that permit is of no significance.

The Staff's suggestion that the University's noncommercial status is now relevant to the short-spacing waiver creates a preference for noncommercial over commercial programming

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22/ (...continued)
Duffy, 7 FCC Rcd 1734, 1736 (1992) (refusing to grant short-spacing waiver even though applicant would be starting first Black-owned FM service in community); Open Media Corp., 8 FCC Rcd 4070, 4071 (1993) (rejecting argument that waiver of FM spacing rules was required because station would be providing first minority/female public radio service).

23/ See Letter from Barbara A. Kreisman to Thomas Aube, FCC File No. BPET-900122KE (Feb. 28, 1991) (the "Kreisman Letter") (Exhibit F hereto).

24/ Indeed, the Video Services Division was apparently most interested in whether the University had sufficiently demonstrated its ability to serve both Pueblo and Colorado Springs. See Kreisman Letter at 2 (finding that the University had established "that the University serves both the Pueblo and Colorado Springs areas and that it is therefore important that [KTSC] do so as well").

25/ The factors the Commission considers are (1) unsuitability of the existing site analyzed in technical terms; (2) the magnitude of the short-spacing; (3) the nature and extent of any predicted loss of service that would occur as a result of the short-spacing; (4) the aeronautical and environmental benefits and drawbacks of construction at the proposed site; (5) the concerns, if any, expressed by licensees affected by the short-spacing; (6) the extent to which the licensee obtained its first license knowing there were spacing restraints; and (7) any technical proposal by the applicant to reduce or eliminate interference. See Sarkes Tarzian, Inc., 6 FCC Rcd at 2466. The Kreisman Letter relied on factors (1), (3), (5), and (7) in granting the University's waiver request. See Kreisman Letter at 2.

which not only conflicts with FCC precedent but also violates the First Amendment. To grant a technical waiver based upon an applicant's commercial or noncommercial status is obvious content regulation which cannot be reconciled with basic First Amendment principles.[26/]

Clearly there is no governmental interest in distinguishing between commercial and noncommercial programming in the context of short-spacing waivers. The Staff makes no attempt to show how content-based application of Section 73.610 furthers any governmental interest, much less a legitimate one. To do so, the Staff would have to demonstrate that a short-spaced noncommercial station will cause less interference than a short-spaced commercial station. The absurdity of the argument proves the point. The Staff cannot be permitted to single out commercial stations for disparate treatment in short-spaced situations when the governmental interest - preventing objectionable interference among television stations -- bears no relationship to the programming a station airs or a station's commercial or noncommercial status.[27/]

3. The Staff's Application of Allotment Waiver Policies Was Improper. The Staff compounded its error by concluding that a de novo short-spacing waiver granted to SCC would have to be considered in an allotment context.[28/] The Staff mistakenly assumed that because the Channel Swap involves a technical amendment to the Table of Television Allotments, standard allotment policies and rules apply equally to channel exchanges and a channel allotment. This is simply not the case.

26/ City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993).

27/ See id. at 1514.

28/ Staff Decision at ¶ 23.

The Commission has expressly recognized that there are fundamental differences between a standard allotment and a channel exchange proceeding. The former results in the creation of a new allotment or reallotment of a channel to a particular community. By contrast, the only change effected by a channel exchange is a "shifting [of] reservations within the same band from one channel to another . . . . The number of reserved and unreserved channels available to provide service to a given community . . . remain[s] the same."[29/] There is "no change in the overall number of allotments in the community and no new allotment will become available;" thus, ordinary allotment policies do not apply.[30/] Unlike a new channel allotment,[31/] a channel exchange precludes third parties from expressing an interest in the channels being exchanged.[32/] The public interest analysis required of the Commission is also different: in an allotment proceeding, the Commission must consider whether a new allotment is consistent with its allotment priorities.[33/] No comparable analysis is made in a channel exchange.[34/]

29/ Channel Exchange Order, 59 RR 2d at 1462 (emphasis added).

30/ Amendment of Section 73.606(b) (Pueblo, Colorado), 8 FCC Rcd 4752, 4754 (1993) ("Channel Swap Notice").

31/ Expressions of third party interests are explicitly permitted in a regular allotment proceeding. 47 C.F.R. § 1.420(d).

32/ Channel Exchange Order, 59 RR 2d at 1462.

33/ See Sixth Report and Order, Docket Nos. 8736, 8975, 41 FCC 148 (1952).

34/ The Commission's public interest analysis in a channel exchange centers on the noncommercial educational station's ability to continue service to its city of license, any technical benefits or drawbacks that could result from the exchange, and ultimately the overall benefits to the two stations involved and to the public. See Channel Exchange Order, 59 RR 2d at 1464a.

In sum, reconsideration of the merits of the University's short-spacing waiver should never have occurred. Reconsideration in the allotment context only compounded the Staff's first error. Indeed, it would have been more appropriate for the Staff to compare the Channel Swap with an application for assignment of license. Like the assignor and assignee in a typical station assignment, parties to a channel exchange are assigning their channels and physical facilities to each other. Although facilities and authorizations change hands in an assignment, communities of license do not change and the channels remain where they are. The same is true of a channel exchange. It is, of course, axiomatic that the Commission does not reevaluate the prior grant of a short-spacing waiver to the seller/assignor of a station when considering a station sale nor does it require the proposed buyer/assignee to establish its independent eligibility for the waiver originally granted to the assignor.[35/] The same result is required here.

C. The Staff Failed to Recognize the Substantial Public Interest Benefits Resulting from the Channel Swap.

SCC and the University demonstrated -- and the Commercial Competitors did not dispute -- that the Channel Swap would have the following public interest benefits:

(i) the University will receive a monetary endowment of $1 million that it would, in turn, use to expand its network of TV translator stations, and to enhance its current noncommercial educational programming.

35/ See, e.g., Caloosa Television Corp., 3 FCC Rcd 3656, granting Caloosa Television Corp. ("Caloosa"), the licensee of Television Station WEVU, Naples, Florida, a waiver of the television short-spacing rules to permit Caloosa to relocate WEVU to a site that would be 7.1 miles short-spaced to an unbuilt co-channel station. As indicated in the FCC's BAPS Facility/Application Information Report (the "FAIR Report") for the period from 01/01/94 through 04/27/95 (attached hereto as Exhibit G), WEVU has been sold twice since the Commission's 1988 grant of the short-spacing waiver and licensing of the station with its short-spaced facilities. Neither the FAIR Report nor the Commission's files reflect any Commission concern that the proposed assignees would succeed to the waiver originally sought and obtained by Caloosa.

(ii) the University will receive from SCC a dual, 30 kilowatt cross-polarized transmitter (with a total capacity of 60 watts) to replace its present single, 30 kilowatt transmitter.

(iii) the University will receive from SCC the license and state-of-the-art transmission equipment for SCC's television translator K30AA, Colorado Springs.

(iv) the University's station, KTSC, will enjoy a service gain of 5,393 persons within its Grade B contour, and, through use of TV Translator K30AA, will increase service to an additional 211,633 persons in Colorado Springs.

(v) the University will expand its TV translator network to the Western Slope of Colorado such that 82,871 persons on the Western Slope would receive their first off-air noncommercial educational television service.

(vi) SCC will increase its coverage of Colorado Springs, providing improved NBC service to the area and enhancing its own competitive position in the Pueblo/Colorado Springs television market.

The Staff Decision disregarded these benefits.

1. Monetary and Technical Benefits. The Staff ignored the fact that the Channel Swap would provide the University with (a) a new transmitter; (b) a new translator station to provide improved service to Colorado Springs; and (3) $1 million to be used for expanded service and programming. At a time when most PBS stations like KTSC face operation-threatening financial cutbacks,[36/] the Staff's casual indifference to the monetary and technical benefits the University

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36/ The Staff is apparently oblivious to the financial crisis faced by public broadcasters and the ongoing public debate in 1995 over future funding. Legislation enacted on July 27, 1995 drastically cut federal funding for the Corporation for Public Broadcasting ("CPB"), a federal organization that provides funding to the Public Broadcasting Service, National Public Radio and numerous noncommercial educational radio and television stations across the United States. Emergency Supplemental Appropriations For Additional Disaster Assistance, For Anti-Terrorism Initiatives, For Assistance In The Recovery From The Tragedy That Occurred At Oklahoma City, And Recissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 218 (1995). Public broadcasters have traditionally received approximately 14% of their total funding from CPB. Elizabeth Rathbun, The Selling of Public TV, Broadcasting & Cable, Feb. 13, 1995, at 43. Congress is proposing additional cuts for FY 1998 that would reduce

(continued...)

would receive from the Channel Swap must not be countenanced by the Commission. It certainly cannot be reconciled with either the purposes underlying channel exchanges or prior decisions approving channel exchanges.[37/]

2. Gains in Service. The Staff improperly discounted the service gains that KTSC would achieve by expanding its translator service to Colorado Springs and the Western Slope. Without even discussing what those gains would be, the Staff decided that they were "too speculative" given the possibility of translator displacement.[38/] This conclusion is absolutely contrary to the Staff's 1989 "conclusion" that translator displacement in Colorado is not likely because spectrum is available and channels can be selected that are not likely to be displaced.[39/] The

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36/ (...continued)
CPB's appropriation even more. H.R. 2127, 104th Cong., 1st Sess. (1995). And, it is expected that federal CPB funding will be completely phased out by the end of the century. See Paul Farhi, Big Bird Taken Off Death Row; Congress May Soften on Public Broadcasting, The Washington Post, July 13, 1995, at C1; Bill Carter, WNET Braces for Cuts or Worse, The New York Times, Jan. 25, 1995, at C13. To compensate for the recent cuts, public broadcasters are searching out alternative revenue sources, such as increased advertising and joint operating agreements with stations in the same market. Elizabeth Rathbun, Merge or perish? Public TV stations consider combining forces in face of federal funding cuts, Broadcasting and Cable, May 22, 1995, at 46. Whether these measures will prove successful is unclear; what is clear is that the FCC should be helping rather than hindering public broadcasters' efforts to survive in tighter financial times. The Staff's denial of the Channel Swap abdicates the agency's responsibility in that regard.

37/ See Channel Exchange Order, 59 RR 2d at 1461 ("Noncommercial educational stations in particular may receive consideration for such exchanges that permit them to improve the quality of their facilities.").

38/ Staff Decision at ¶ 24.

39/ tvUSA/Pueblo, Ltd., 4 FCC Rcd at 600. There, the Staff refused to permit SCC to substitute operation of a satellite station for its existing Colorado Springs translator based in part on the "remote possibility" that the translator would be displaced. Here, the Staff refused to consider the benefits of translator operation because of the likelihood of displacement! The Staff cannot have it both ways: either translator displacement in Colorado is likely or it is not likely; it cannot be both.

Staff offers no explanation for its abrupt about-face concerning the likelihood of translator displacement. This inconsistency requires reversal of the Staff Decision.

The factual errors underlying the Staff's assumption are demonstrated by the attached Engineering Statement, which confirms that the actual likelihood of displacement is very remote because of spectrum availability in Colorado and the improbability that the channels to be used in the University's translator network will be displaced by full service television operations.[40/] And, even if this occurred, the University could use other channels to continue translator service to the Western Slope.[41/]

Moreover, the Staff Decision fails to recognize translators' unique role in providing service to unserved areas in Colorado. For nearly 25 years, the Commission has recognized that translators are essential to providing television service to remote areas that cannot be reached

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40/ Currently, there are forty-five television stations allocated to Colorado; seventeen are reserved for noncommercial use. Engineering Statement at Table 3 (Exhibit C hereto). Of these total allocations, eighteen are vacant, including thirteen reserved for noncommercial stations. Id.; 47 C.F.R. § 73.606(b) Sixteen of these channels have been vacant since 1966. See 47 C.F.R. § 73.606, reprinted in 1 RR 53:636, 53:637 (Regulations) (1966). Given the number of allotments, the fact that they have remained vacant for nearly 30 years, and that the relatively small populations involved would make it economically unfeasible to build a full service station, displacement of the University's translators is indeed a slim practical possibility.

41/ See Engineering Statement at 2. See also Joint Reply Comments at 21-22. Moreover, the Commission has adopted special "displacement" procedures which permit displaced television translator licensees to move to a different channel without having to wait for a filing window or having to compete with other applicants. See Low Power Television & Television Translator Service, 2 FCC Rcd 1278 (1987). The availability of these procedures further reduces the chances of permanent displacement.

by a primary station due to terrain factors.[42/] The Commission has found this particularly true in Colorado because

> the broken terrain of much of Colorado calls for the use of translators, and in fact most of the stations in Colorado Springs and elsewhere in the state utilize them.[43/]

Colorado is the eighth largest state in land area but 26th largest in population. Its population represents less than 1% of the total U.S. population.[44/] Nonetheless, **13% (617)** of the licensed translators in the U.S. serve Colorado.[45/] By sheer numbers alone, therefore, it is clear that translators are indispensable to continued off-the-air television service in Colorado. Through expansion of the University's translator network, the University will provide the first, noncommercial educational television service to 82,871 persons on the Western Slope

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42/ See, e.g., Quality Telecasting Corp., 22 RR 2d 959 (1971) (finding that translators were necessary to provide fill-in service to city of license due to rough and unique terrain in Puerto Rico); Nevada Radio-Television, Inc., 25 RR 2d 1197, 1202 (1972) ("[i]t cannot be gainsaid that Nevada, with its vast unsettled areas, its rugged terrain and, . . . its lack of major centers of populations, constitutes a unique situation" warranting use of a translator network), recon. dismissed, FCC No. 73-351 (1973); Low Power Television & Television Translator Service, 102 FCC 2d 295, 302 (1984); Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations, (Glenwood Springs and Alamosa, Colorado, and Price and Vernal, Utah), 46 RR 2d 1388 (1980) (the fact that translators may be needed by Glenwood Springs, Colorado station to reach places within its normal service area because of terrain factors does not weigh heavily against a channel assignment) ("Glenwood Springs, CO").

43/ Glenwood Springs, CO, 46 RR 2d at 1389. The National Telecommunications and Information Administration ("NTIA") has expressly recognized that a number of regions throughout Colorado, and the Western Slope in particular, must rely on translators to provide off-the-air service to remote areas due to rough terrain. See Joint Reply Comments at 23-24 (citing Public Broadcasting Coverage in the United States, U.S. Dept. of Commerce, National Telecommunications and Information Administration at 53 (1989)).

44/ Rand McNally, 1995 Commercial Atlas & Marking Guide, p.135 (126th ed. 1995).

45/ See Engineering Statement at Tables 1 and 2. There are currently 4,806 translators licensed across the United States. Id.

and a new noncommercial educational television service to an additional 211,633 persons in Colorado Springs. Given the substantial service gains and the Commission's unequivocal recognition of translators' role in providing primary, off-air television service to rural areas in Colorado, the Staff's disregard of the service gains as "speculative" is appalling and cannot be upheld.[46/]

3. Benefits to SCC. The Commission's channel exchange policies are intended to benefit both commercial and noncommercial licensees; the ultimate beneficiaries are, of course, the viewing public.[47/] Yet, the Staff mistakenly concluded that any benefit to SCC would not also benefit the public.[48/] Again, the Staff ignored precedent. The Commission expects that both commercial and noncommercial licensees/permittees will derive substantial benefits from a channel swap and that the public will benefit therefrom. This expectation is confirmed in its swap decisions which depend, in part, on the benefits to the commercial participant. Thus, the Gary, Indiana swap permitted the commercial applicant to relocate to the Sears Tower, and thereby to increase coverage of both Gary and Chicago. The Clermont, Florida swap permitted

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46/ The Staff also incorrectly assumed that the University would proceed with its translator expansion regardless of the Channel Swap's outcome. Staff Decision at ¶¶ 24, 26. Again, the Staff has misread the facts and the University's pleadings. The University filed its translator applications in anticipation of the Commission's approval of the Channel Swap. As the University has explained, it has earmarked certain of the funds it expected to receive from the Channel Swap for a number of projects including expansion of its translator network. See Joint Reply Comments at 5, n.11. Without SCC's contribution, and given the recent cuts in CPB funding, it is less likely that the University would be able to expand its network as originally planned.

47/ Channel Exchange Order, 59 RR 2d at 1461 ("[i]ntraband exchanges are desirable because such exchanges may benefit both of the stations involved, with consequent advantages for the public.").

48/ Staff Decision at ¶ 21.

the commercial station to increase its coverage of Orlando despite the fact that the station was licensed to the smaller community of Clermont. In 1969 the Commission approved the swap of two New Orleans VHF stations where the commercial station would increase its coverage of and ABC service to "areas beyond the New Orleans metropolitan area."[49/] The Commission also permitted a UHF commercial licensee in San Francisco to swap channels with a noncommercial licensee recognizing the importance of an expansion in the commercial station's coverage outside of the San Francisco area.[50/]

SCC is no different than the commercial permittees in Gary, Indiana or Clermont, Florida. Its interests are the same as the licensees in New Orleans, Louisiana and San Francisco, California. An NBC affiliate's desire to expand its coverage of a principal market community and to enhance its competitive stance vis-a-vis other stations should not be discouraged; the ultimate beneficiaries of KOAA-TV's efforts will in fact be the citizens of Colorado Springs who will enjoy increased NBC service and a more competitive economic environment. The Staff's misinterpretation of its own decisions and what the public interest requires must be reversed.

4. Public Support for the Channel Swap. Finally, the Staff gave no consideration to the substantial public support for the Channel Swap. The Joint Reply Comments included letters

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49/ Amendment of Section 73.606(b) of the Commission's Rules and Regulations, Television Table of Assignments (New Orleans, LA), 17 FCC 2d 419, 419-20 (1969) ("New Orleans, Louisiana").

50/ Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (San Francisco and San Mateo, California), 68 FCC 2d 860, 861 (1978) ("San Francisco, California") (acknowledging that the exchange "could well offer substantial public benefit through significant improvements in the coverage areas of both stations"), recon. denied, 45 RR 2d 233 (1979).

of support from local, state and federal officials, including the Mayor of Colorado Springs, the President of the Chamber of Commerce of Colorado Springs, the President of the Latin American Chamber of Commerce of Pueblo, congressmen from the Colorado Springs/Pueblo market and both of Colorado's U.S. Senators. Each of these leaders expressed their approval of and support for the Channel Swap.[51/] Like the many other public interest factors warranting grant of the Channel Swap, Colorado's support for the Channel Swap was simply ignored by the Staff.

IV. The Staff's Refusal To Consolidate the Channel Swap With The Collateral Proceedings Constituted Prejudicial Procedural Error.

The Staff's denial of the University's and SCC's Joint Motion to Consolidate Proceedings (the "Consolidation Motion") makes no logical sense. The Collateral Proceedings and the Channel Swap are legally and factually inseparable. The Commercial Competitors made the Channel Swap the overriding legal and factual issue in the Collateral Proceedings.[52/] Indeed, absent the Channel Swap it is very doubtful that the Commercial Competitors would ever have

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51/ See Joint Reply Comments, Attachment A.

52/ For example, Pikes Peak's Petition to Deny the University's translator applications centered on the University's intentions with respect to the Cheyenne Mountain Permit and specifically requested that the Commission delay consideration of the applications until the Channel Swap was resolved. Petition to Deny University Applications to Construct UHF Television Translators at Grand Junction, Cortez-Red Mesa, Durango, and Ignacio, Colorado at 3, 5 (May 14, 1993). The status and validity of SCC's authorization for K15BX was brought into question by Pikes Peak, which filed a Petition for Reconsideration of SCC's STA to operate K15BX. Pikes Peak's Petition was based on the erroneous claim that SCC's request to extend the STA was "a clumsy effort [by SCC] to obtain, by manipulation of the FCC's policies and rules, what it otherwise has been unable to legitimately obtain; namely University's short-spaced Cheyenne Mountain site." Petition for Reconsideration of Pikes Peak at 8 (Feb. 9, 1993).

initiated those proceedings. Consolidation therefore was warranted based on common sense alone.[53/]

At the very least, the Staff should have considered together the Channel Swap and the Collateral Proceedings relating to extension and assignment of the Cheyenne Mountain Permit. If the Channel Swap is to occur, the Cheyenne Mountain Permit must be included.[54/] Indeed, the Cheyenne Mountain Permit is the focal point of the Staff Decision, and clearly, the Commercial Competitors have made the Cheyenne Mountain Permit the focus of their 40 different pleadings attacking the Channel Swap.[55/] Moreover, the Commercial Competitors did not have the least interest in the Cheyenne Mountain Permit until the Channel Swap was announced.[56/] If the Channel Swap is approved, the Cheyenne Mountain Permit will be key to its implementation. The Staff's conclusion that the application proceedings involving the Cheyenne Mountain Permit are unrelated to the Channel Swap simply defies logic.[57/]

The Staff's refusal to consolidate the Collateral Proceedings with the Channel Swap prejudices the University and SCC because it ensures continuing, needless litigation. Even when

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53/ A chronology of the numerous pleadings (40 in total) filed by the Commercial Competitors) in the Collateral Proceedings and the Channel Swap is attached hereto as Exhibit H. Only four of the Commercial Competitors' 40 pleadings were filed in direct response to the Staff's Channel Swap Notice.

54/ The University and SCC are unwilling to go forward with the Channel Swap unless the Cheyenne Mountain Permit is included.

55/ See, e.g., Comments of KKTV at 16-18 (Sept. 3, 1993); Comments of Pikes Peak at 4-6 (Sept. 3, 1993).

56/ Neither of the Commercial Competitors opposed the University's short-spacing waiver request.

57/ Staff Decision at ¶ 9.